NO. 82-943

IN THE

Supreme Court of the United States

October Term, 1982

DORIS B. ROSSON and DORIS B. ROSSON,
t/a DOCTOR'S ANSWERING SERVICE
and/or GREATER MANASSAS ANSWERING SERVICE,

Appellant,

v.

CITY OF MANASSAS and F. R. HODGSON,
ZONING ADMINISTRATOR, CITY OF MANASSAS,

Appellee.

ON APPEAL FROM
THE SUPREME COURT OF VIRGINIA

MOTION TO AFFIRM
UNITED WITH MOTION TO DISMISS

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MOTION TO AFFIRM
UNITED WITH MOTION TO DISMISS

THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED ARE NOT SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION, FOR THE JUDGMENT RESTS ON ADEQUATE FEDERAL AND NONFEDERAL BASIS.

A. SECTION 1-34(a) OF THE ZONING ORDINANCE OF THE CITY OF MANASSAS IS SUBSTANTIALLY AND REASONABLY RELATED TO PUBLIC HEALTH, SAFETY AND WELFARE.

B. SECTION 1-34(a) OF THE ZONING ORDINANCE OF THE CITY OF MANASSAS IS REASONABLY SUITED TO ACHIEVE THE DESIRED LEGISLATIVE GOAL OF PROTECTING AND PROMOTING HARMONIOUS RESIDENTIAL AREAS.

C. REGULATIONS SIMILAR TO SECTION 1-34(a), RESTRICTING EMPLOYMENT IN CONNECTION WITH HOME OCCUPATIONS, HAVE LONG BEEN USED AND HAVE BEEN UPHELD BY THE COURTS.

D. SECTION 1-34(a) OF THE ZONING ORDINANCE OF THE CITY OF MANASSAS IS VALID AND CONSTITUTIONAL AS CONSTRUED, ADMINISTERED AND APPLIED BY CITY TO ROSSON.

E. SECTION 1-34(a) OF THE ZONING ORDINANCE OF THE CITY OF MANASSAS IS IN COMPLETE CONFORMITY WITH CONSTITUTIONAL REQUIREMENTS OF EQUAL PROTECTION IN THAT IT IS RATIONALLY BASED AND IS FREE OF INVIDIOUS DISCRIMINATION.

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MOTION TO AFFIRM
UNITED WITH MOTION TO DISMISS

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE UNITED STATES SUPREME COURT:

THE CITY OF MANASSAS, VIRGINIA, a municipal corporation of The Commonwealth of Virginia, and F. R. HODGSON, ZONING ADMINISTRATOR FOR THE CITY OF MANASSAS, by counsel, hereby present and submit their MOTION TO AFFIRM the final judgment or decision of The Supreme Court of Virginia rendered on September 9, 1982, in a case styled City of Manassas, et al. v. Doris B. Rosson, et al., Record No. 800642, upholding the validity and constitutionality of a certain zoning provision of The City of Manassas zoning ordinance, and, united in the alternative, their MOTION TO DISMISS the Appellant's appeal for want of a substantial federal question.

For purposes of these motions, The City of Manassas, Virginia, a municipal corporation of The Commonwealth of Virginia, will be designated as "City." F. R. Hodgson, the present Zoning Administrator for the City of Manassas, together with Edward T. Freed, the Zoning Administrator for the City of Manassas on or about the 29th day of November, 1978, will be designated as "Zoning Administrator." Doris B. Rosson t/a Doctor's Answering Service and/or Greater Manassas Answering Service, will be designated as "Rosson."

Reference to the Appendix, submitted as part of the Appellant's Jurisdictional Statement, will be made by the designation (A. p. __).

I. STATEMENT OF THE CASE

The zoning ordinance of the City of Manassas permits a limited home occupation

in a residential district; however, Section 1-34(a) of the ordinance restricts the right to "the immediate family residing in the dwelling." (A. p. 44). The validity of Section 1-34(a) was challenged by Doris B. Rosson who, on December 7, 1978, was summoned to appear in the state General District Court to answer a charge that she operated a business in a residential district in violation of the Manassas ordinance. Upon her conviction in the state General District Court, she appealed to the Circuit Court of Prince William County, a court of record or trial court.

While the appeal was pending, the Zoning Administrator of the City of Manassas filed in Circuit Court a petition for injunction seeking to restrain Mrs. Rosson from continuing to conduct a business in a residential district. The trial court considered the appeal and the

petition together and, after a hearing, declared Section 1-34(a) of the Manassas ordinance unconstitutional. By order entered February 1, 1980, the trial court dismissed the criminal charge against Mrs. Rosson and denied the City's petition for injunction. (A. pp. 35-37). An appeal to the Supreme Court of Virginia, the highest court of the Commonwealth of Virginia in which a decision could be rendered, was granted The City of Manassas and its Zoning Administrator with respect to the denial of the injunction petition and presented the question whether Section 1-34(a) was invalid, on constitutional grounds, in prohibiting "outside" employees in home occupations.

The record showed that Mrs. Rosson, a widow without immediate family, conducted and continues to conduct, a telephone answering service in her home on Sudley Road in Manassas. Mrs. Rosson

employed two part-time workers to assist her; neither is related to her, and both resided elsewhere.

Mrs. Rosson's property is located in a single-family residential district that extends along both sides of Sudley Road, a four-lane, heavily-traveled thoroughfare in Manassas. Within a short distance of Mrs. Rosson's home, a chiropractor, an orthopedic surgeon, and a general surgeon conduct their practices in dwellings located on Sudley Road. Across the road from Mrs. Rosson's home, Wright Realty, Inc., operates a real estate business in a former dwelling. Two of the medical offices purport to qualify as valid limited home occupations. The other medical office and the real estate business claim valid status as non-conforming uses. Only the real estate business was shown to have "outside" employees.

On appeal to the Supreme Court of Virginia, the City contended the trial court erred in holding Section 1-34(a) invalid. The City asserted that the said section which restricts the right to "the immediate family residing in the dwelling" to engage in limited home occupation in residential districts was (1) substantially and reasonably related to the purposes and intent of zoning, (2) reasonably suited to the achievement of a valid legislative goal of protecting and promoting harmonious residential areas, and (3) was not discriminatory, arbitrary, unreasonable and violative of constitutional requirements of due process and equal protection either in its enactment or its application to Mrs. Rosson. On the other hand, Mrs. Rosson contended the trial court was correct because this section of the ordinance (1) "is not substantially or reasonably related to the accomplishment

of the health, safety and general welfare of the people," (2) "is not reasonably suited to protecting and promoting harmonious residential areas," and (3) "does not comply with constitutional requirements of equal protection, neither in its enactment nor in its application to the facts of this case, and in particular, to Rosson."

The Supreme Court of Virginia in its decision of September 9, 1982, upheld the validity and constitutionality of the City's zoning regulation and addressed each and every argument proffered by the Appellant herein. It is this decision (A. pp. 1-20, 39 and 40) that the Appellant seeks to appeal (A. pp. 41-43).

II. ARGUMENT

THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED ARE NOT SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION, FOR THE JUDGMENT RESTS ON ADEQUATE FEDERAL AND NONFEDERAL BASIS SO AS TO NEED NO FURTHER ARGUMENT.

A. SECTION 1-34(a) OF THE ZONING ORDINANCE OF THE CITY OF MANASSAS IS SUBSTANTIALLY AND REASONABLY RELATED TO PUBLIC HEALTH, SAFETY AND WELFARE

This appeal should be dismissed and The Virginia Supreme Court decision affirmed summarily. The applicable principles are well-settled at both the state and federal level so as to no longer present a substantial federal question to require full, plenary consideration by the United States Supreme Court.

This Court and the Supreme Court of Virginia have taken the view that as a general rule a zoning regulation will be upheld as constitutional unless it is clearly arbitrary and unreasonable--that is, unless it has no substantial relation to the public health, safety, morals, or general welfare.

In this Court's landmark case of Euclid v. Ambler Realty Co., 272 U.S. 365,

394 (1926), this Court upheld the constitutionality of a village's comprehensive zoning plan for regulating and restricting such things as the location of trades, industries, apartment houses, two-family houses, single-family houses, the lot area to be built upon, and the size and height of buildings. As with the present case, the Euclid ordinance was attacked on the grounds that it violated the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution and certain similar provisions of the State constitution. (A. pp. 47 and 48).

This Court held then, and has consistently held since 1926, on such matters that the ordinances find their justification in the police powers, asserted for the public welfare. This Court has recognized that land-use regulation is within

the inherent police powers of the states and their political subdivisions. See Village of Belle Terre v. Boraas, 416 U.S. at 9 (1974); Berman v. Parker, 348 U.S. 26 at 32-33 (1954); Euclid v. Ambler Realty Co., 272 U.S. at 387.

This Court observed in Euclid that such legitimate zoning goals were sufficiently cogent to preclude this Court from saying, as it had to be said before the ordinance could be declared unconstitutional, that the provisions of such ordinances were clearly arbitrary and unreasonable, or having no substantial relation to the public health, safety, morals or general welfare.

Furthermore, this Court has previously held that there is a strong doctrine that legislation, such as zoning and land-use regulation, is presumed to be valid and its unconstitutionality is not to be presumed, but

must be clearly established and proven. Such regulation amounts to economic and social legislation which this Court will protect against a charge of violation of the Equal Protection Clause so long as the regulation is reasonable and not arbitrary and bears a rational relationship to a permissible state objective. See Village of Belle Terre, 416 U.S. at 8.

The applicable principles in Virginia are also well settled. In Board of Supervisors v. Carper, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959), the Virginia Supreme Court has said:

> The legislative branch of a local government in the exercise of its police power has wide discretion in the enactment and amendment of zoning ordinances. Its action is presumed to be valid so long as it is not unreasonable and arbitrary. The burden of proof is on [the person] who assails it to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the

> public health, safety, morals or general welfare. The court will not substitute its judgment for that of a legislative body, and if the reasonableness of a zoning ordinance is fairly debatable it must be sustained.

And, in Fairfax County v. Snell Corp., 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974), the Virginia Supreme Court held:

> Inherent in the presumption of legislative validity stated in Carper is a presumption of reasonableness. But, as Carper makes plain, the presumption of reasonableness is not absolute. Where presumptive reasonableness is challenged by probative evidence of unreasonableness, the challenge must be met by some evidence of reasonableness. If evidence of reasonableness is sufficient to make the question fairly debatable, the ordinance "must be sustained." If not, the evidence of unreasonableness defeats the presumption of reasonableness and the ordinance cannot be sustained.

A fairly debatable question is presented "when the evidence offered in support of the opposing views would

lead objective and reasonable persons to reach different conclusions." Fairfax County v. Williams, 216 Va. 49, 58, 216 S.E.2d 33, 40 (1975). The evidence required to raise a question to the fairly debatable level must be "not only substantial but relevant and material as well." Id., at 58, 216 Va. S.E.2d at 40. And, while a trial court's finding of unreasonableness in zoning action carries a presumption of correctness, the Virginia Supreme Court still accords the action its presumption of legislative validity in its review. See Loudoun Co. v. Lerner, 221 Va. 30, 34-35, 267 S.E.2d 100, 103 (1980).

This Court has also pointed out that if the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control. See Euclid v. Ambler Realty Co., 272 U.S. at

388. This Court has defined certain objectives as legitimate zoning goals. These legitimate zoning goals have been held to include the legal limiting of intrusion of commercial activities into residential areas, the maintenance of traditional family character in beautiful and healthy residential zones, the fostering of social homogeneity, by limiting "disturbing noises," "increased traffic," and the "hazards of moving and parked automobiles" and the providing of children with the "privilege of quiet and open spaces for play." See Euclid v. Ambler Realty Co., 272 U.S. at 394, and Village of Belle Terre v. Boraas, 416 U.S. at 9, and Berman v. Parker, 348 U.S. at 32-33.

In harmony with the guidelines of the United States Supreme Court, the Virginia high court has held, in Fairfax

County v. Snell, 214 Va. at 657, 202 S.E.2d at 892, that Chapter 11 of Title 15.1 (Planning, Subdivision and Zoning) of The Code of Virginia (1950) is

> ...intended to encourage local governments to improve public health, safety, convenience or welfare and to plan for the future development of communities to the end that transportation systems be carefully planned; that new community centers be developed with adequate highway, utility, health, educational and recreational facilities; that the needs of agriculture, industry and business be recognized in future growth; that residential areas be provided with healthy surroundings for family life; and that the growth of the community be consonant with the efficient and economical use of public funds. Va. Code Sec. 15.1-427 (Repl. Vol. 1973).

The restriction placed on limited home occupations by subsection (a) of Section 1-34 of the Zoning Ordinance of the City of Manassas conforms and complies with the purpose of zoning ordinances in that it is reasonably related to the general

purpose of zoning, that of promoting the health, safety and general welfare of the public and improving the health, safety, convenience, and welfare of the citizens of the City of Manassas. Most specifically, the restriction seeks to accomplish the objectives declared in Section 15.1-427 and 15.1-489 of The Code of Virginia (1950), as amended, that "residential areas be provided with healthy surroundings for family life which are convenient, attractive and harmonious," and that "[z]oning ordinances shall be for the general welfare of the public and of further accomplishing the objectives of Section 15.1-427" and that, "[t]o these ends, such ordinances shall be designed...(3) to facilitate the creation of a convenient, attractive and harmonious community..." By limiting the intrusion of commercial activities into residential areas, the restriction

maintains the traditional family character of the residential zones and fosters social homogeneity, by limiting "disturbing noises," "increased traffic," the "hazards of moving and parked automobiles" and by providing children with the "privilege of quiet and open spaces for play," all legitimate zoning goals permitted by Euclid, Village of Belle Terre, and Berman.

"A quiet place, where yards are wide, people few, and motor vehicles restricted, are legitimate guidelines in a land-use project addressed to family needs." Village of Belle Terre, 416 U.S. at 9. This goal is also a permissible one within this Court's decision of Berman. "The police power is not confined to the elimination of filth, stench and unhealthy places." It is proper to "lay out zones where family values, youth values, and

the blessings of quiet seclusion and clean air make the area a sanctuary for people." See Village of Belle Terre, 416 U.S. at 9.

B. SECTION 1-34(a) OF THE ZONING ORDINANCE OF THE CITY OF MANASSAS IS REASONABLY SUITED TO ACHIEVE THE DESIRED LEGISLATIVE GOAL OF PROTECTING AND PROMOTING HARMONIOUS RESIDENTIAL AREAS.

In the field of zoning, the line which "separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions." Euclid, 272 U.S. at 387. Where the question is whether to permit home occupations in residential areas and, if so, to what extent, the legislative body necessarily engages in a balancing of interests that may vary from area to area as circumstances and conditions differ. The Euclid Court further held that "[a] nuisance may be merely a right

thing in the wrong place,--like a pig in the parlor instead of the barnyard." Id., at 388.

Long before comprehensive zoning and the Euclid decision, people used their homes as places in which to work as well as to live. The piano teacher giving lessons in her living room, the dressmaker with her workshop alcove, and the barber with a chair in his basement were accepted members of middle-class residential neighborhoods. Many homes were used not only as residences, but as business offices, professional offices, repair shops, beauty parlors, laundries, studios, and rooming houses. See generally, 2 Anderson, American Law of Zoning, Section 13.01, at 508 (2d ed. 1976), and 2 Rathkopf, The Law of Zoning and Planning, Section 23.01, at 23-24 (4th ed. 1980).

When the early zoning ordinances were drafted, the proponents of zoning observed that home occupations were too numerous and too important to be terminated summarily. Accordingly, many were permitted to continue, subject to restrictions intended to render them so unobtrusive that they would not compromise the primary character of the residential neighborhoods. Professor Robert M. Anderson states in his treatise, 2 Anderson, supra, p. 19 , Section 13.01, at 508 and 509, that the custom of permitting certain accessory uses was described by Professor Bassett in Zoning, The Laws, Administration and Court Decisions During the First Twenty Years, at page 100 (1936) as follows:

> During the formative period of comprehensive zoning it became evident that the districts could not be confined to principal uses only. It had always been customary for occupants of homes to carry on

> gainful employments as something accessory and incidental to the residence use...The earliest zoning ordinances took communities as they existed and did not try to prevent customary practices that met with no objection from the community. Indeed there would have been great opposition to early zoning plans if efforts had been made to prevent doctors or dressmakers from using their homes in residential districts. Customary incidental home occupations are therefore allowed as accessory uses, even in new houses in residential districts. [Emphasis added]
>
> Accordingly, the advent of comprehensive zoning did not mark the demise of home occupations. It did initiate new definitions of those occupations, and a variety of restrictions on their expansion, the accommodation of the dwelling to their needs, and the exterior evidence of their existence. [Emphasis added]

In conformance with the principles of the Euclid decision, the Virginia Supreme Court has properly held that the legislative branch of local government, in the exercise of its police power, has wide discretion in the enactment of zoning ordinances. In Board of Supervisors v.

Carper, 200 Va. at 660, 107 S.E.2d at 395, and reaffirmed in Boggs v. Board of Supervisors, 211 Va. 488, 178 S.E.2d 508 (1971), The Virginia Court summarized the established principles of zoning law as follows:

> The general principles applicable to a judicial review of the validity of zoning ordinances are well settled. The legislative branch of a local government in the exercise of its police power has wide discretion in the enactment and amendment of zoning ordinances. Its action is presumed to be valid so long as it is not unreasonable and arbitrary. The burden of proof is on him who assails it to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare. The court will not substitute its judgment for that of a legislative body, and if the reasonableness of a zoning ordinance is fairly debatable, it must be sustained.

The Council of the City of Manassas had determined that in residential neighborhoods, a certain, limited amount

of business infringement would be desirable and permitted. In order to permit a limited infringement of business activity within residential zones, and yet to preserve, protect and promote harmonious residential areas, the legislative body permitted "limited home occupations" to be conducted in certain residential zones. City Council, in defining the permitted infringement, determined that business activity conducted by family members, to supplement family income, would not unduly destroy the residential character of the area.

Home occupations, by their very nature, are uses accessory to the main use of a dwelling as a residence. If the legislative language which describes or defines "home occupation" did no more than to characterize the use as accessory to the main use of the building as a residence, it would follow that the use

must be conducted by an occupant of the premises. Accordingly, most ordinances spell out the requirement that a home occupation must be carried on by an occupant of the residence with minimal, if any, assistance. See 2 Anderson, American Law of Zoning, Section 13.21, at 539 (2d ed. 1976); 6 Patrick J. Rohan, Zoning and Land Use Control, Section 40.03[3], at 40 (1978).

A common provision, to minimize the size or extent of the commercial nature of such occupations and to prevent the encroachment of offensive trades and the aesthetic values of clean air and quiet seclusion of the area from being adversely affected, is one which prohibits any employees, or limits the number of persons who may be engaged to assist in the conduct of a home occupation. The strictest limitation prohibits the employment of any person to assist in a

home occupation. More permissive, but probably effective under most circumstances, are provisions which exclude employees other than members of the family living on the premises. See 2 Anderson, American Law of Zoning, Section 13.22, at 539 (2d ed. 1976); Euclid, 272 U.S. at 388; Village of Belle Terre, 416 U.S. at 9.

A limited home occupation, as defined and limited by the specific provisions in the Zoning Ordinance of the City of Manassas, is intended to be a use that is incidental to the primary and permitted use of the dwelling for residential purposes. An activity that amounts to a "commercial enterprise" cannot reasonably be classified as mere incident or accessory to the residential use of a dwelling. Such "commercial enterprises" are, accordingly, not

permitted in residential areas as a matter of right, for to allow them would be to countenance commercial encroachment into areas zoned residential, under the guise of a limited home occupation.

The employment of non-resident assistants, "outside" employees, necessarily depicts a class of activities that is different in concept from a limited home occupation, as defined by the legislative body of the City of Manassas. The hiring of unrelated assistants suggests a primary commercial effort rather than a desire of the applicant to supplement and make a few extra dollars by home occupation or industry that is customarily incidental and accessory to the use of a residential dwelling. To enlarge the type or nature of business activities permitted to infringe, by permitting outside, unrelated

employees and thus a primary commercial effort, would open the entire City to the establishment of small businesses or commercial enterprises throughout residential areas and obliterate any lines of demarcation between business and residential use areas. By requiring businesses to be located within certain business zones, a municipality, acting pursuant to its legislative authority and authorization, and subject to the usual conditions respecting the exercise of police powers, may restrict the establishment of businesses or commercial activities or enterprises in particular areas or zones of the municipality. This is now a well-established general proposition of zoning law. Euclid v. Ambler Realty Co., 272 U.S. at 388. Accordingly, zoning legislation may validly create residential districts and exclude from such districts

most businesses and trades.

> The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that...the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. Id., at 388-389.

Such action has been upheld even as to commercial uses that are not inherently offensive to residential neighborhoods. Naegele Outdoor Advertising Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968).

The R-1 residential zoning classification provided by Section 3-1-1 of the zoning ordinance of the City of Manassas (A. pp. 45-46) and the restrictions placed on limited home occupations by Section 1-34 (A. p. 44) are supportable because they (i) bear a rational relationship to the general welfare and (ii)

permit the landowner a reasonable use of his property.

On one side is the pressure to continue the time-honored practice of permitting such persons as doctors, lawyers, music teachers, and dressmakers to practive their professions and pursue their occupations in their respective residences. On the other is the desire to preserve the residential character of areas designated for residential use. Both sides involve important considerations substantially affecting the public health, safety, and welfare.

In making its decision in this type of case, a legislative body properly may consider the necessity of keeping residential areas free of disturbing noises, increased traffic, the hazard of moving and parked vehicles, and interference with quiet and open spaces for child-play. Euclid, 272 U.S. at 394; Village

of Belle Terre, 416 U.S. at 5. Also pertinent are the possible consequences of permitting "outside" employees in home occupations:

> [W]hen the requirement for residence is dropped, what was a home becomes a professional building (where perhaps more than one doctor, lawyer, etc., may engage in the pursuit of his profession); or an erstwhile home is transformed into a place where the business of dressmaking or millinery or music instruction is conducted. Thus, a clearly discordant element is injected into a high-class residential district and erosion of the overall zoning scheme begins.

Keller v. Westfield, 39 N.J. Super. 430, 436, 121 A.2d 419, 422 (1956).

In avoidance of these consequences, Manassas sought to limit the quantum and scope of business activity conducted in residential districts. Striking a balance between the competing interests, the City chose to permit home occupations in residential districts, restricting the right, however, to "the immediate family

residing in the dwelling." This action presented a classic example of legislative discretion at work in aid of the public health, safety, and welfare. The legislative judgment must be allowed to control in light of this Court's decision in Euclid, 272 U.S. at 388.

C. REGULATIONS SIMILAR TO SECTION 1-34(a), RESTRICTING EMPLOYMENT IN CONNECTION WITH HOME OCCUPATIONS, HAVE LONG BEEN USED AND HAVE BEEN UPHELD BY THE COURTS.

The restriction placed on limited home occupation by subsection (a) of Section 1-34 of the City of Manassas zoning ordinance is typical and comparable provisions appear in many other zoning ordinances. See, as a representative sample, LITTLE ROCK, ARK., ZONING ORDINANCE, Section 43-1(32) (1973); TAMPA, FLA., ZONING ORDINANCE, Section 39-1 (1966); CHARLOTTE, N.C., ZONING ORDINANCE, Section 23-32.1(9) (1973); ATLANTA, GA., ZONING ORDINANCE, Article III, Section 1 (1965);

NEWPORT NEWS, VA., ZONING ORDINANCE, Article II, Section 201(33) (1978); ARLINGTON, VA., ZONING ORDINANCE, Section 1 (1980); ALEXANDRIA, VA., ZONING ORDINANCE, Section 42-1(36) (1979); CHARLOTTESVILLE, VA., ZONING ORDINANCE, Section 31-3 (1979); EMPORIA, VA., ZONING ORDINANCE, Section 24-3 (1972); WAYNESBORO, VA., ZONING ORDINANCE, Section 27-2 (1964); RICHMOND, VA., ZONING ORDINANCE, Section 32.1-1220 (1978); CITY OF KILLEEN, TEX., ZONING ORDINANCE, Section 6-1 (1978); HAVERFORD TOWNSHIP, PA., ZONING ORDINANCE, Section 43 (1978); BOROUGH OF VERONA, N.J., ZONING ORDINANCE, Section 6.13 (1957); and CITY OF TULSA, OKLA., ZONING ORDINANCE, Section 12 (1962).

Regulations similar to Section 1-34(a) restricting employment in connection with home occupations, have long been used and have been upheld by the state supreme courts. Such regulations have

been found constitutional and reasonably suited to achieve the legitimate legislative goals of zoning presented in this case. See for example Lemp v. Township of Millburn, et al., 129 N.J.L. 221, 28 A.2d 767 (N.J. 1942); Keller v. Westfield, 39 N.J. Super. 430, 121 A.2d 419 (N.J. 1956); State v. Mair, 39 N.J. Super. 18, 120 A.2d 487 (N.J. 1956); North Hempstead v. White, 1 Misc. 2d 228, 144 N.Y.S.2d 358 (N.Y. 1955), aff'd 1 App. Div. 2d 781, 148 N.Y.S. 2d 461; Bourke v. Foster, 343 S.W.2d 208 (Mo. 1960); Cauvel v. City of Tulsa, 368 P.2d 368 (Okla. 1962); Jantausch v. Borough of Verona, 131 A.2d 881 (N.J. 1957); Good v. Zoning Hearing Board of Haverford Township, 384 A.2d 1374 (Pa. 1978); Parks v. The Board of Adjustment of the City of Killeen, 556 S.W.2d 365 (Tx. 1978); Holocomb v. City and County of

Denver, 606 P.2d 858 (Colo. 1980).

Section 1-34 of the Manassas Zoning Ordinance permits certain limited home occupations as secondary, supplementary uses within residential zones while attempting to preserve the existing character of the residential area by excluding prejudicial uses, and to provide for the development of the residential areas in a manner consistent with the uses for which they are intended.

It is clearly within the police power of the legislature to pass an ordinance limiting the number of outside, unrelated employees engaged in home occupations. If such an ordinance is passed in the interest of the health, safety, comfort or convenience of the public, or for the promotion of public welfare and is reasonable, then it is constitutional and valid. Eubank v.

City of Richmond, 110 Va. 749, 67 S.E. 376 (1910).

Zoning ordinances enjoy a strong presumption of constitutional validity. In harmony with the Euclid decision, the Virginia Supreme Court has established the following tests for determining whether the presumption of reasonableness or validity should stand or fail. If the presumptive reasonableness of zoning action is challenged by probative evidence of unreasonableness, the challenge must be met by evidence of reasonableness. If such evidence of reasonableness is sufficient to make the issue fairly debatable, the legislative action must be sustained; if not, the presumption is defeated by the evidence of unreasonableness and the legislative act cannot be sustained. Fairfax County v. Snell Corp., 214 Va. at 659, 202 S.E. 2d at 893. Therefore, in all cases where a party

chooses to attack the constitutionality of an ordinance, such party bears a heavy burden to demonstrate that the challenged ordinance is unconstitutional. This burden has not been met by Rosson in the present case. The City established the reasonableness of the restrictions and of the different treatment given to other business infringements in the area.

A statement by the City Manager, one of the City's witnesses, was directly on point:

> [T]here is nothing to my mind that could be any more damaging to a piece of residential property than to have a business spring up next door if it is not properly handled, and, in order to make sure that the business is not one that can get out-of-hand and be objectionable to the neighborhood, the best way in my opinion is to make sure that it is strictly operated by the people that live in the home.

The Virginia Supreme Court properly held that this statement of the City Manager,

and other evidence submitted by the City, was sufficient to make the question of the restriction's reasonableness at least fairly debatable. Hence, the presumption of reasonableness was not defeated.

When the restrictions placed on private property by the Manassas Zoning Ordinance are read as a whole, the ordinance must be found to strike a judicious balance between private property rights and the public interest. The restrictions, by necessity, limit the type of business activity that is tolerated within a residential zone, by limiting the quantum and scope of the business to that of a family business activity or "limited home occupation." Such restrictions, in limiting the scope of business infringement into residential areas, preserve the public health,

enhance the public safety from fires, aid in protection by police, and foster the public welfare by maintaining the traditional family character of the residential area, and increase the general prosperity of the neighborhood through social homogeneity. See Village of Belle Terre v. Boraas, 416 U.S. at 7.

It has been suggested by Rosson that the City of Manassas could promulgate a more equitable, less discriminatory, criteria on employment in home occupations which would balance the public interest and the private property rights without discrimination. Mrs. Rosson contended that, even conceding the desirability of promoting and protecting harmonious residential areas, a "no outsider" restriction in home occupations is unreasonable. Mrs. Rosson argued that Manassas could have preserved the family character of residential districts and

yet permitted "outside" employees in home occupations by limiting to two the number of such employees. The Virginia Supreme Court agreed that this might have been a reasonable alternative, but it does not follow that it is the only reasonable plan or that the plan adopted by Manassas is unreasonable. Fairfax County v. Jackson, 221 Va. 328, 335, 269 S.E.2d 381, 386 (1980); (A. pp. 12-13).

A similar argument was presented to the Supreme Court of the United States in Village of Belle Terre. The zoning ordinance, by its definition of "family," provided that not more than two unmarried people may constitute a "family." It can be said, however, that if two unmarried people can constitute a "family," there is no reason why three or four may not. "But every line drawn by a legislature leaves some out that might well have been included. That exercise of

discretion, however, is a legislative, not a judicial, function." Village of Belle Terre v. Boraas, 416 U.S. at 8.

Mr. Justice Holmes, in Louisville Gas Co. v. Coleman, 277 U.S. 32, 41 (1928), made the point a half century ago in this manner:

> When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to necessity behind it, the line or point seems to be arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or a point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark. [Emphasis added]

Legislative action is reasonable if the matter at issue is fairly debatable. Euclid v. Ambler Realty Co., 272 U.S. at

388; County of Fairfax v. Parker, 186 Va. 675, 680, 44 S.E.2d 9, 12 (1947). An issue may be said to be fairly debatable when, measured by both quantitative and qualitative tests, the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions. Fairfax County v. Williams, 216 Va. at 58, 216 S.E.2d at 40. Therefore, where the City has adopted a standard or criteria and the standard suggested by the property owner might, for purposes of argument, both be appropriate to accomplish the desired legislative goal, a classic case of "fairly debatable" issue is presented. "Under such circumstances, it is not the property owner, or the courts, but the legislative body which has the prerogative to choose the applicable" criteria for "classification."

See Fairfax County v. Jackson, 221 Va. 328, 335, 269 S.E.2d 381 (1980). [Emphasis added].

D. SECTION 1-34(a) OF THE ZONING ORDINANCE OF THE CITY OF MANASSAS IS VALID AND CONSTITUTIONAL AS CONSTRUED, ADMINISTERED AND APPLIED BY CITY TO ROSSON.

E. SECTION 1-34(a) OF THE ZONING ORDINANCE OF THE CITY OF MANASSAS IS IN COMPLETE CONFORMITY WITH CONSTITUTIONAL REQUIREMENTS OF EQUAL PROTECTION IN THAT IT IS RATIONALLY BASED AND IS FREE OF INVIDIOUS DISCRIMINATION.

A zoning ordinance must not arbitrarily discriminate, either in terms or application. When a land use permitted to one landowner is restricted to another similarly situated, the restriction is discriminatory, and, if not substantially related to the public health, safety, or welfare, constitutes a denial of equal protection of the laws. Bd. Sup. James City County v. Rowe, 216 Va. 128, 140,

216 S.E.2d 199, 210 (1975). But, in reviewing zoning ordinances, the courts "deal with economic and social legislation where legislatures have historically drawn lines which [the courts] respect against the charge of violation of the Equal Protection Clause if the law be "'reasonable not arbitrary'" ... and bears 'a rational relationship to a [permissible] state objective.'" Village of Belle Terre v. Boraas, 416 U.S. at 8; Reed v. Reed, 404 U.S. 71, 76 (1971); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). Therefore, a zoning restriction is inviolate against an equal protection claim if it is reasonable and bears a rational relationship to a permissible state objective. "No matter how legitimate the legislative goal may be, the police power may not be used to regulate property interests unless the

means employed are reasonably suited to the achievement of that goal." Alford v. Newport News, 220 Va. 584, 586, 260 S.E.2d 241, 243 (1979).

The Virginia Supreme Court properly concluded and upheld the reasonableness of the "no outsider" restriction and further held the restriction to be rationally related to a permissible state objective. See Gorieb v. Fox, 274 U.S. 603 (1927).

Section 1-34(a) of the Manassas Zoning Ordinance does not discriminate in its operation or application to Rosson and thereby does not deny Rosson the equal protection of the laws. Rosson has failed to show at any stage of this litigation, where she has been treated any differently from any other single person who is without family desiring to engage in a limited home

occupation. Rosson has been treated as all citizens "similarly situated" have been treated. Rosson has not been restricted nor treated differently when compared with other "similarly situated" non-residential uses within the same residential zone. No limited home occupation is conducted in the City of Manassas with the assistance of outside, non-related employees except that of Rosson.

Rosson was never able to show any invidious discrimination, but only inequality due to the fact she was widowed and desired to conduct a twenty-four hour telephone answering service from her residential home. Section 1-34(a), the Manassas Zoning Ordinance, does not offend the Equal Protection Clause merely because it is not prepared with mathematical precision, or because in practice it results in some inequality.

The regulation limits employment in home occupations to immediate family residing in the dwelling and bears alike and uniformly on all within the subject R-1 residential district. It is invidious discrimination and not simply inequality which is protected under the Equal Protection Clause. The fact that Rosson may experience some inequality because of the lack of family residing within her residential home does not preclude her from conducting her business in a properly zoned business zone and does not deny her equal protection of the law. See Louisville Gas, 277 U.S. at 41; Zahn v. Board of Public Works, 274 U.S. 325 (1927).

Virginia Code Sections 15.1-427 and 15.1-489 establish the legislative goal of providing residential areas "with healthy surrounding[s] for family life"

and facilitating "the creation of a convenient, attractive and harmonious community." The achievement of this goal is a permissible state objective. Belle Terre, 416 U.S. at 9. The "no outsider" restriction of the Manassas ordinance contributes directly and substantially to that objective. Hence, Section 1-34(a) does not in its terms arbitrarily discriminate among those subject to its restriction.

Rosson maintained, however, that, in application, Section 1-34(a) "discriminates against widows, the unmarried, and those...not fortunate enough to have families."[1] She says that, as a

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[1] A similar argument was made in Belle Terre: "It is said that the Belle Terre ordinance reeks with an animosity to unmarried couples who live together." This Court replied: "[T]here is no evidence to support [the argument]; and the provision of the ordinance bringing within the definition of a 'family' two unmarried people belies the charge." 416 U.S. at 8.

widow with no immediate family, "she has been singled out for different, if not special treatment."

However, not one scintilla of evidence was introduced to support this theory of applied or "functional" discrimination. The mere fact that certain uses have become protected, vested uses should not prevent enforcement of legitimate legislative goals. Dr. Allan Marshall, a chiropractor, acknowledged equal treatment under the law by the fact his profession was conducted subject to the restriction placed on outside employees.

The burden was upon Rosson to prove she was the object of discrimination by

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The Manassas zoning ordinance contains a similar inclusive definition of "family": "A number of persons not exceeding three living and cooking together as a single housekeeping unit though not related by blood, adoption or marriage." Section 1-25(b), MANASSAS, VA., ZONING ORDINANCE.

showing she was treated differently from others "similarly situated." She failed in this burden. The mere reciting that there are other businesses or non-residential uses permitted in the same residential zone merely serves to confuse and obfuscate the real issues. Other business uses may and were shown to be permitted as vested uses either because they were permitted as nonconforming uses or in that such uses met the requirements of the then current law. She neither showed that another in her status, a single or widowed non-family property owner, had been permitted to use "outside" employees in a home occupation nor that her situation was similar to the one property owner in the neighborhood actually using "outside" employees.

Rosson has implied that the City's recognition of Wright Realty's nonconforming use and the location of group

homes, homes for adults, hospitals and schools within residentially zoned districts are wrongful, resulting in discrimination against her, and she suggested that the wrong can be corrected only by permitting her to use "outside" employees in her business (A. pp. 46 and 47). Even if we assume Wright Realty's use and the above identified uses were wrongful, this Court must likewise reject this suggestion; the law does not follow the thesis that two wrongs make a right. Furthermore, Rosson fails to represent to this Court that group homes and homes for adults are strictly regulated by the Manassas Zoning Ordinance and require the issuance of a special use permit, subjecting the use to reasonable conditions, from Council before such use may be carried on in a residential zone. Additionally, the inclusion of these group homes

within the R-1 district has been made by Council pursuant to the mandate of the General Assembly found in Section 15.1-486.2 of The Code of Virginia (1950).

Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. See Jefferson v. Hackney, 406 U.S. 535, 546 (1972); Richardson v. Belcher, 404 U.S. 78, 81 (1971); Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 426 (1961). "The specific zoning regulations" of The City of Manassas restricting employment to immediate family residing in a residential dwelling and requiring limited home occupations to be secondary or accessory to the main residential use "are exercises of the City's police power to protect the residents of" Manassas "from the

ill-effects of urbanization" by protecting the residential character of the zone and fostering social homogeneity and municipal tranquility. "Such governmental purposes long have been recognized as legitimate." See Agins v. City of Tiburon, 447 U.S. at 261 (1980).

Rosson is free to use her home as a residence and to pursue a reasonable or limited telephone answering service from her residential zone by conducting such a business without outside, unrelated employees. This Court has held that municipal zoning ordinances are not violative of the Fifth Amendment guarantee that private property shall not be taken for public use without just compensation. Id., at 259. Therefore, it cannot be said that the impact of the City's restriction has denied Rosson "the justice and fairness guaranteed by the Fifth and Fourteenth Amendments." Id., at 259.

This Court has held in Berman that once an objective is within the authority of a legislative body, the means employed to attain that objective are for that body to determine. The legitimate goal in Manassas is the development of a better balanced and more attractive community with business located in business zones and residences located within residential zones, with the possible exception of secondary family enterprises to supplement family income. Once this goal was adopted, the legislature had the power to ordain reasonable laws under the police powers to accomplish such goal.

This case is clearly distinguishable from this Court's decisions in Schad v. Mt. Ephram, 451 U.S. 61 (1981), and Moore v. East Cleveland, 431 U.S. 494 (1977). The present case before this

Court does not involve an appeal based upon "fundamental rights" guaranteed by the Constitution such as the right of association, the right of privacy, the right of free speech or expression, or the right to make personal, private choices in matters of marriage and family life. The Manassas Zoning Ordinance under review has not attempted to limit any fundamental right guaranteed by the United States Constitution or the Constitution of Virginia.

Finally, as recently as July, 1981, this Court has reaffirmed the principles established in Belle Terre, which is now requested by the Appellant to be reviewed and overruled in this present appeal. In Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981), this Court cited Belle Terre, with approval, in saying of the San Diego ordinance that

"the twin goals that the ordinance seeks to further--traffic safety and the appearance of the city--are substantial governmental goals. It is far too late to contend otherwise with respect to either traffic safety, Railway Express Agency, Inc. v. New York, 336 U.S. 106, 93 L.Ed. 533, 69 S.Ct. 463 (1949), or esthetics, see Penn Central Transportation Co. v. New York City, 438 U.S. 104, 57 L.Ed. 2d 631, 98 S.Ct. 2646 (1978); Village of Belle Terre v. Boraas, 416 U.S. 1, 39 L.Ed. 2d 797, 94 S.Ct. 1536 (1974); Berman v. Parker, 348 U.S. 26, 33, 99 L.Ed. 27, 75 S.Ct. 98 (1954)."

III. CONCLUSION

For the foregoing stated reasons, the Appellees, The City of Manassas, Virginia, and F. R. Hodgson, Zoning Administrator for The City of Manassas, pray that the Virginia Supreme Court decision rendered herein on September 9, 1982, be AFFIRMED and that this appeal noted to the United States Supreme Court be DISMISSED.

Respectfully submitted this 30th

day of December, 1982.

By: Robert W. Bendall

Robert W. Bendall*
Smith and Davenport

Turner T. Smith
Smith and Davenport

*On December 14, 1982, Mr. Bendall submitted the Required Oath, Application, Certificate, and Filing Fee for admission to practice before the Supreme Court of the United States. By telephone conversation on December 21, 1982, with the Clerk's Office of this Court, Mr. Bendall was informed that his application was in proper order and that admission would be granted and effective January 10, 1983.

CERTIFICATE AND AFFIDAVIT OF SERVICE

Pursuant to Rules 28.3 and 28.5(b) and (c) of The Rules of United States Supreme Court, I hereby certify that I have mailed, first-class postage prepaid, a true copy of the foregoing Motion to Affirm united with Motion to Dismiss to all parties required to be served and addressed to counsel of record as follows:

William J. LoPorto, Esq.
P. O. Box 367
Callao, Virginia 22435

This 29th day of December, 1982.

Robert W. Bendall

STATE OF VIRGINIA
AT LARGE, to-wit:

SUBSCRIBED AND SWORN to before me this 29th day of December, 1982.

Lori A. Carter
Notary Public

My commission expires September 19, 1983.